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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1558

RICHARD BECK,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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To the United States Court of Appeals for the Sixth Circuit

The petitioner, Richard Beck, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on March 11, 1975, rehearing denied May 13, 1975.

OPINIONS BELOW

The district court rendered no formal opinion. The opinion of the Court of Appeals for the Sixth Circuit is set forth in Appendix A, infra, pp. A-1-A-11. Relevant court orders and memoranda appear in Appendix B, infra, p. A-12.

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JURISDICTIONAL STATEMENT

The judgment of the Sixth Circuit Court of Appeals was entered on March 11, 1975. A timely petition for rehearing was denied on May 13, 1975 (Appendix B, infra, p. A-12). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner was convicted of violating the Hobbs Act, 18 U.S.C. § 1951 and the bank theft statute, 18 U.S.C. §§ 2, 2113(b). The Sixth Circuit reversed and vacated the Hobbs Act conviction and affirmed the bank theft count. Evidence essential to the Government's case was procured by federal and state agents as the fruit of an automobile search. Two separate aspects of the searches and seizures are discernible under the facts. The initial intrustion was made while the automobile was on a motel parking lot, after a significant period of surveillance. The second took place at a police lot under the guise of an inventorying operation. Under the circumstances, the following issues arise regarding petitioner's Fourth Amendment Rights:

A. Where law enforcement agents have assured themselves that the occupants of an automobile purportedly involved in a bank theft are no longer in the vicinity, and the practicalities of obtaining prior judicial review are ever present, is a subsequent warrantless search and seizure reconcilable with the Fourth Amendment?

B. Where law enforcement agents have safely secured the automobile in question after having it removed to a location of their choosing, can a warrantless search and seizure of the contents of a locked truck compartment be justified under the requirements of the Fourth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner was convicted of violating the Hobbs Act, 18 U.S.C. § 1951 (1970), and the bank theft statute, 18 U.S.C. §§ 2, 2113(b). Petitioner was sentenced to concurrent prison terms of twenty and ten years respectively on each count. The Court of Appeals for the Sixth Circuit reversed the Hobbs Act conviction and affirmed the bank theft conviction. A timely petition for rehearing was denied on May 13, 1975.

On December 29, 1972 approximately $50,000.00 was taken from the Frayser branch of the National Bank of Commerce in Memphis, Tennessee as the result of hoax perpetrated on James J. Sledge, the assistant vice president and manager of the Frayser branch. Mr. Sledge had been instructed by an anonymous phone caller that his wife and grandchildren were being held hostage, and that he was to obtain $50,000.00 in various denominations and deliver it to a given location where he would receive further instructions. At the designated location, the $50,000.00 was taken from Sledge's automobile. In point of fact, Mrs. Sledge and the grandchildren were totally unaware of any disturbance. (Tr. 13, 50-51, 85, 91, 336-339)

A customer of the bank followed Sledge to the drop-off location. There, the customer obtained the license number and gen-

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eral description of the automobile purportedly containing the thieves. (Tr. pp. 244-253) Special agent Harcum of the FBI broadcasted the description of a late model Ford or Thunderbird to available law enforcement agencies and proceeded to ascertain the identity of the subscriber to the license plates. (Tr. 19a-24a, 32a, 37a)

Sergeant Pugh of the Memphis Police Department, while checking motels searching for the automobile, located the late model Thunderbird at approximately 2:40 p.m. or some four hours after the theft, parked in a Howard Johnson's Motel parking lot. (Tr. 33a-36a) Detective Wilkerson, who had accompanied Pugh, set up a physical surveillance of the auto while Pugh attempted to ascertain if the Thunderbird's occupants were within the area. The surveillance continued for about an hour until the officers had assured themselves that the occupants of the vehicle were not in the vicinity of the motel. (Tr. 33a-43a)

The car was locked, and Sgt. Pugh looked inside and saw a brown glove, a telephone book, a spiral notebook and a box of some kind of candy (Tr. p. 43a) Thereafter, Pugh took a coat hanger and unlocked the car door but did not open it. Somewhere in this sequence of events, officers from the Memphis Crime Scene Division arrived and proceeded to process the interior of the automobile. (Tr. 34a-39a) The search did not last long when it began to rain and the vehicle was towed away by the police. (Tr. 31a, 40a, 43a)

At the Armour Station lot the auto was permitted to dry for fingerprint processing, which was accomplished at approximately 6:00 p.m. that same day. (Tr. p. 44a) The trunk had yet to be opened.

The next morning the FBI and local officers returned with a locksmith and opened the trunk of the car. No law enforcement officer procured a search warrant. The personal effects contained in the trunk were inventoried and seized. (Tr. 48a-52a)

REASONS FOR GRANTING THE WRIT

The facts herein clearly raise the question of whether evidence seized pursuant to repeated warrantless automobile searches is admissible against Petitioner where the practicalities of obtaining prior judicial review are present. The Sixth Circuit answered that question in the affirmative (No. 74-1704) — F.2d — (Sixth Cir. 1975), upon the reasoning that probable cause justified the initial intrusion. Reliance at least in part was made upon *United States v. Shye*, 473 F.2d 1061 (Sixth Cir. 1973). *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed2d 419 (1970) and *Cardwell v. Lewis*, — U.S. —, 94 S.Ct. 2464, 41 L.ed2d 325 (1974) were relied upon to support the premise that the subsequent search and seizure at the Armour Station lot was justifiable.

Review herein would serve to aid in the reconciliation of what appears to be conflicting principles emanating from *Coolidge v. New Hampshire*, 403 T.S. 443, 91 S.Ct. 2022, 29 L.Ed2d 564 (1971) and *Chambers v. Maroney*, supra, in the present factual setting. The public interest and general importance would clearly be served.

The issue is raised assuming arguendo, that the initial intrusion was justified, whether a subsequent warrantless search and seizure from a locked compartment of the vehicle is lawful in light of very distinct practicalities for obtaining prior judicial review? The Sixth Circuit reasoned that the principles of *Chambers*, supra, obtained and justified this later more methodical intrusion.

It is submitted that the public importance of adding clarity and alaying conflict in the law is evident and that the decision below was in error.

First: *Coolidge v. New Hampshire*, supra held that where law enforcement agents are in possession of probable cause and

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intend to seize a particular item, a warrant is a necessary prerequisite. The practicalities of obtaining a search warrant reemerged as the guiding principle which is determinitive of the reasonableness of a warrantless search and seizure.

Here the Memphis police (and the FBI) were armed with probable cause and fully intended to seize and search the Thunderbird. They, however, first allowed whatever exigencies existing due to the unknown location of the suspect or suspects to dissipate at least in so far as the automobile was concerned. The marvels of modern communications left the police with merely an inconvenience so far as complying with the warrant requirement was concerned.

Substantial questions are raised in regard to the obvious public interest in efficient law enforcement and the preservation of civil liberties. *United States v. United States District Court for E.D. of Michigan*, 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed2d 752, and *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed2d 596 (1973) would lead us to believe that the preservation of individual rights is the more important consideration. *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) and its progeny would lead to the opposite conclusion.

Various circuits have further confused the status of the law of search and seizure. *United States v. Bradshaw*, 490 F.2d 1097 (Fourth Cir. 1974); *United States v. Garay*, 477 F.2d 1306 (Fifth Cir. 1973). The Sixth Circuit herein has accentuated the controversies. See also *United States v. Shye*, 473 F.2d 1061 (1973).

Second: *Chambers v. Maroney*, supra, relied upon below, made it clear that where the initial intrusion was justified, the search can be continued and expanded at some other location. From *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69

L.Ed. 543 (1975) the recognition of the uniqueness of the automobile predictably points to the result of *Chambers*, supra. See also *Harris v. United States*, 396 U.S. 234, 88 S.Ct. 992, 19 L. Ed2d 1067 (1968).

Assuming arguendo, that the initial intrusion by the Memphis police was lawful, it does not follow that the more methodical subsequent search and seizure is therefore legitimated automatically. *United States v. Garay*, supra. Unlike *Cardwell v. Lewis*, — U.S. —, 94 S.Ct. 2464, 41 L.Ed2d 325 (1974), personal effects in a locked trunk compartment were here seized some twelve hours after the seizure of the automobile. *Cash v. Williams*, 455 F.2d 1227 (1972). Such delay does not comport with the Court's reasoning in *Coolidge*, supra.

Compliance with administrative regulations is not involved. *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed2d 730 (1970). Nor can it be said that the search of the locked trunk followed from a legitimate need to protect the property of the suspects or the interests of the law enforcement agents. Discord otherwise arises with this Court's pronouncements in *Cooper*, supra, and *Harris*, supra.

No other case presents the factual context for the constitutional issues presented. Petitioner's situation lies squarely in the gap that exists between the Court's previous decisions regarding automobile searches. The general importance of the issues herein is evident.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted

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June 9, 1975

APPENDIX

APPENDIX A

No. 74-1704

United States Court of Appeals
For the Sixth Circuit

United States of America, Plaintiff-Appellee, v. Richard Beck, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Opinion

(Decided and Filed March 11, 1975)

Before: Celebrezze, Peck and McCree, Circuit Judges.

Peck, Circuit Judge. Defendant-appellant ("appellant") was convicted at a jury trial in district court of violating the Hobbs Act, 18 U.S.C. § 1951 (1970),[1] and the bank theft

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[1] "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

statute, 18 U.S.C. §§ 2, 2113(b) (1970).[2] The district judge sentenced appellant to concurrent prison terms of twenty and ten years on the Hobbs Act and bank theft convictions, respectively.

The convictions stemmed from the taking on December 29, 1972, of approximately $50,000 from the Frayser branch of the National Bank of Commerce in Memphis, Tennessee. James J. Sledge, an assistant vice-president and manager of the Frayser branch, testified that in mid-morning (approximately 10:45 a.m.) he received a telephone call warning that,

> "I have a little bad news for you this morning, your home is being watched and your wife and grandchildren are being held as hostage. . . . Everything will be all right if you will go ahead and follow my instructions. My instructions are to get up fifty thousand dollars in hundreds, twenties and tens and deliver them to me. . . ." Trial Transcript at 50.[3]

Sledge testified that he then told his head teller to "fix me up" a cloth bag containing $50,000 and that he parked his car

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[2] "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punished as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. § 2 (1970).

"Whoever takes or carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 2113(b) (1970).

[3] Sledge's wife and grandchildren were never harmed and, in fact, were never held hostage. The telephone line to Sledge's residence, however, had been cut preventing Sledge from contacting them and evoking alarm in Sledge in light of the caller's admonition that "[f]orty-five [seconds] after I hang up you can call your home and see if you can get through." Trial Transcript at 50.

containing the bag in a certain parking lot. A bank customer, "ha[ving] an idea something was wrong because two [bank employees] were in tears, . . . and [because Sledge] had a worried look on him," followed Sledge in his automobile away from the branch and parked near Sledge's automobile in the parking lot. Then Sledge, as instructed, went from his automobile to a pay telephone booth from where he was unable to see his automobile. From his truck, however, the customer saw a man open the door of Sledge's automobile and remove the bag. The customer then followed that man and the person driving that man from the parking lot, eventually "get[ting] up close enough to get the[ir] license number" before they sped away from him.

Less than four hours later (approximately 2:40 p.m.), Memphis police located a locked automobile in a motel parking lot with license plates matching those that the customer had written down and approximating the description of the automobile the customer had trailed. Authorities discovered that no motel guest had registered the automobile, that the automobile was registered to a Shirley Mueller, of St. Louis, Missouri, that her husband, Lester Henry Mueller, Jr.,[4] was suspected in a similar bank extortion in Missouri, that a Lester "Milner" had registered at the motel, and that "Milner" gave the motel a non-existent St. Louis address and an incorrect automobile license number. The police then summoned certain investigators who began to "work the vehicle." Because of rain the car was towed shortly thereafter (approximately 5:10 p.m.) to a police impound lot where the processing, including a search of the trunk of the automobile, was completed.

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[4] The grand jury on January 8, 1973, indicted Mueller and appellant on charges of violating the Hobbs Act and the bank theft statute. Mueller, however, was never tried, having been slain in Clayton, Missouri, on May 28, 1973. Trial commenced on July 9, 1973.

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Of the four errors appellant claims on appeal, we find one to be meritorious. Consequently, we vacate the Hobbs Act conviction; we affirm the bank theft conviction.

THE HOBBS ACT VIOLATION

First, appellant claims that convicting him of violating the Hobbs Act and the bank theft statute violated the double jeopardy and cruel and unusual punishment clauses and the specialty and multiplicity doctrines. Although two circuits, including this one, have applied the Hobbs Act to the extortion of bank assets, *Stout v. United States*, — F.2d —, No. 74-1036 (6th Cir., filed January 10, 1975), *United States v. Grieser*, 502 F.2d 1295 (9th Cir. 1974), the applicability of the Hobbs Act seems to have been assumed rather than examined. *Stout*, in fact, concerned the voluntariness of a guilty plea and involved the applicability of the Hobbs Act only tangentially. Moreover, while courts have broadly construed the Hobbs Act, see, e.g., *United States v. Gill*, 490 F.2d 233 (7th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974) (police extortion from tavern in exchange for "overlooking" certain liquor violations), *United States v. Mitchell*, 463 F.2d 187, 193 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973) (militant civil rights activity), *United States v. Pranno*, 385 F.2d 387, 389 (7th Cir. 1967), *cert. denied*, 390 U.S. 944, 972 (1968) (politicians' threat to withhold building permit unless $20,000 paid), we remain unpersuaded that the Hobbs Act was designed to reach, or reaches, the extortion of bank assets, having been intended to curb labor racketeering. See *United States v. Franks*, Nos. 73-2157, -2158, -2159, -2160, 74-1138 (6th Cir., filed Feb. 12, 1975). However, we need not here consider the applicability of the Hobbs Act, since we conclude that the Hobbs Act conviction was improper because the bank theft statute, being "a comprehensive scheme for prosecuting and punishing persons who rob federally-insured

banks," was intended to exclusively proscribe conduct within its "coverage." *United States v. Canty*, 469 F.2d 114, 127-129 (D.C. Cir. 1972).

United States v. Marx, 485 F.2d 1179 (10th Cir. 1973), *cert. denied*, 94 S.Ct. 2391 (1974), which involved strikingly similar extortion of bank assets, established that the bank theft statute proscibes such conduct. We recognize that this (*Stout, supra*) and the Ninth (*Grieser, supra*) circuits have applied the Hobbs Act to the extortion, or attempted extortion, of bank assets, but no case has yet addressed the exclusivity of the bank theft statute in reference to the Hobbs Act. Stout and Grieser were convicted *only* of violating the Hobbs Act.

Like the *Canty* court, however, we are of the view that, in appropriate circumstances and under additional facts, a bank robber can be convicted of and sentenced, even consecutively, for a section 2113 ("Bank Robbery and incidental crimes") and another violation. For example, had appellant been a convicted felon and used certain firearms, 18 U.S.C. App. § 1202(a) (1970), in obtaining the bank's monies, he could be convicted of and sentenced, even consecutively, for such firearms and bank theft violations. In the present situation, however, the Hobbs Act conviction cannot stand because precisely the same facts which permit judicial notice of the interstate nature of a national bank's operations, without addition or modification, provide the basis for it and a conviction under section 2113.

Although the Hobbs Act conviction cannot stand, we uphold the bank theft conviction because we find no prejudice in appellant's being tried on both charges rather than being tried on the bank theft charge alone. Joining the Hobbs Act charge resulted in the admission of no prejudicial evidence that would have been inadmissible at a trial on charges of violating

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only the bank theft statute. *Canty, supra,* at 129. See *Prince v. United States,* 352 U.S. 322, 329 (1957); *United States v. Faleafine,* 492 F.2d 18, 26 (9th Cir. 1974); *Marx, supra,* at 1186. See also *Rutkowski v. United States,* 149 F.2d 481, 483 (6th Cir. 1945).

THE SEARCH AND SEIZURE ISSUES

Second, appellant urges that the warrantless seizure and multiple searches of the automobile violated the Fourth Amendment, requiring the suppression as evidence of the items uncovered in the searches. Even if the seizure and searches were otherwise proper, appellant claims that the admission of his spiral notebook and its contents violated his Fourth Amendment right of privacy with regard to personal papers and his Fifth Amendment privilege against self-incrimination.

Even assuming that appellant has standing to assert improper searches and seizure,[5] the warrantless seizure and searches were "reasonable" under the circumstances and, thus, lawful. Similarly, we find no error in admitting the spiral notebook.

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[5] Though the government has claimed that appellant, being neither the owner of the automobile nor present during the search, lacks standing, recent case law portends finding such standing in appellant. In *Cash v. Williams,* 455 F.2d 1227, 1229 (6th Cir. 1972), this court flatly said that "[i]n order to establish standing to contest a search, a defendant must show that he owned or possessed the seized property *or* that he had a possessory interest in or was present at the premises searched" (emphasis in originals). Moreover, in *United States v. Hearn,* 496 F.2d 236, 240-241 (6th Cir.), *cert. denied,* 95 S.Ct. 622 (1974), for example, in finding no standing, this court pointed out that the defendant asserting the unlawful search claimed no interest in the seized property. Similarly, *Brown v. United States,* 411 U.S. 223 (1973), *aff'g* 452 F.2d 868 (6th Cir. 1971), though finding no standing, four times noted that the party asserting the unlawful search claimed "no proprietary or possessory interest . . . in the goods seized . . ., nor was any evidence of such an interest presented." 411 U.S. at 225-226, 228, 229-230. Because we assume standing, it is unnecessary to determine whether appellant, in fact, sufficiently asserted a "proprietary or possessory interest in the goods seized."

This court[6] and the Supreme Court[7] have often dealt with the lawfulness of warrantless searches and seizures of automobiles. Though "reasonable" warrantless searches are rare, *Cash v. Williams*, 455 F.2d 1227, 1231-1232 (6th Cir. 1972), probable cause that an automobile contains evidence or fruits of a crime plus "exigent circumstances" invariably justify the warrantlessness of a search or seizure of the automobile. Here, because direct evidence established that the automobile was used in obtaining the bag from Sledge's automobile and because it was improperly registered at the motel, appellant neither argues nor could argue that there was no probable cause. Appellant does argue, however, that no exigent circumstances excused the government's failure to obtain a warrant. Admittedly, probable cause alone can never justify a warrantless search or seizure, *United States v. Lewis*, 504 F.2d 92, 100 (6th Cir. 1974). Like *United States v. Shye*, 473 F.2d 1061 (6th Cir. 1973), however, exigent circumstances existed in that the searches and seizure occurred within hours of the taking of the bag and in that the thieves were still at large and the stolen property was unrecovered. The cases appellant has cited and the cases in this circuit invalidating warrantless automobile searches because exigent circumstances were absent have involved a search or seizure either several days after the crime, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (more than one month), *Lewis v. Cardwell*, 476 F.2d 467 (6th Cir. 1973),

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[6] E.g., *United States v. Upthegrove*, 504 F.2d 682 (6th Cir. 1974); *United States v. Lewis*, 504 F.2d 92 (6th Cir. 1974); *United States v. Kemper*, 503 F.2d 327 (6th Cir. 1974); *United States v. Isham*, 501 F.2d 989 (6th Cir. 1974); *United States v. Bush*, 500 F.2d 19 (6th Cir. 1974); *United States v. Shye*, 473 F.2d 1061 (6th Cir. 1973); *Cook v. Johnson*, 459 F.2d 473 (6th Cir. 1972); *Cash v. Williams*, 455 F.2d 1227 (6th Cir. 1972).

[7] E.g., *Cardwell v. Lewis*, 94 S. Ct. 2464 (1974), *rev'g* 476 F.2d 467 (6th Cir. 1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 458-464 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Cooper v. California*, 386 U.S. 835 (1967); *Preston v. United States*, 376 U.S. 364 (1964); *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925).

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rev'd on other grounds, 94 S. Ct. 2464 (1974) (more than two months), *Cook v. Johnson*, 459 F.2d 473 (6th Cir. 1972) (four days), where the suspected culprit has been arrested and jailed, *Kaufman v. United States*, 453 F.2d 798, 802-803 (8th Cir. 1971), where the stolen "property" has been recovered, *Cook, supra*, where the police could properly retain custody of the automobile on another basis pending issuance of a warrant, *Cash, supra*, at 1231, or where the facts underlying the search and seizure were available to the law officers prior to beginning their investigative work, see *United States v. Fullmer*, 457 F.2d 447 (7th Cir. 1972). But see *Lewis v. Cardwell*, 94 S. Ct. 2464, 2472 (1974).

We again hold, as has the Supreme Court, that a warrant to authorize the further search of the automobile at the impound lot was not required. *Cardwell, supra*, at 2470-2472; *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970); *United States v. Isham*, 401 F.2d 989, 991 (1974).

Appellant's further contention that, even if the warrantless searches and seizure of the automobile were proper, the admission of his spiral notebook was nonetheless improper, stems from Supreme Court dictum. In *Boyd v. United States*, 116 U.S. 616, 633 (1886), which involved an order to produce evidence, the Court in dictum went on to confess its inability "to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." Accord, *Gouled v. United States*, 255 U.S. 298, 306 (1921). More recently, although *Warden v. Hayden*, 387 U.S. 294, 303 (1967), abolished the "mere evidence" rule, the Court noted that "[t]his case does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." We, however, find that admitting the spiral notebook, on these facts, violated neither the Fourth nor Fifth Amendments.

Admitting properly seized "personal papers" cannot violate the Fifth Amendment privilege against self-incrimination. Unlike an order which "compels" production of evidence, *Boyd, supra,* at 618, the owner of a notebook uncovered in a search in his absence is under no compulsion. See *United States v. Blank,* 459 F.2d 383, 385 (6th Cir. 1972), *rev'g* 330 F. Supp. 783 (N. D. Ohio 1971); *United States v. Murray,* 492 F.2d 178, 191 (9th Cir. 1973); *United States v. Scharfman,* 448 F.2d 1352, 1355 (2d Cir. 1971), *cert. denied,* 405 U.S. 919 (1972). But see *Hill v. Philpott,* 445 F.2d 144 (7th Cir. 1971). Being unaware of the search, he has no choice. Comment, The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations, 6 Loyola (Cal.) L. Rev. 274, 290n.93 (1973). *Couch v. United States,* 409 U.S. 322, 327-336 (1973), established that mandated cooperation, rather than the "privacy" of the owned papers, is the *sine qua non* of the privilege against self-incrimination. See Comment, The Protection of Privacy by the Privilege Against Self-Incrimination: a Doctrine Laid to Rest?, 59 Iowa L. Rev. 1336 (1974). Similarly, though "testimonial" evidence was seized in *United States v. White,* 401 U.S. 745 (1971), the Court sustained the admission of such uncompelled evidence without feeling even the need to discuss the privilege against self-incrimination.

Though the overall search and seizure is proper and though there is no compelled cooperation, the search and seizure of the papers must also be "reasonable." As the Second Circuit so aptly said,

> "The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries; most of us would feel rather differently with respect to a 'diary' whose cover page bore the title 'Robberies I have Performed.' Similarly the adhorrence generally felt

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> with respect to 'rummaging' through the contents of a desk to find an incriminating letter would not exist in the same measure if the letter were lying in plain view." *United States v. Bennett*, 409 F.2d 888, 897 (2d Cir.), *cert. denied sub. nom., Haywood v. United States*, 396 U.S. 852 (1969), *Thomas v. United States*, 402 U.S. 984 (1971).

The "search" of the spiral notebook for its communicative value and for fingerprints, see *United States v. Hill*, 454 F.2d 282 (9th Cir. 1972), under the present circumstances, was hardly unreasonable in that, as in *Bennett*, there was no extensive "rummaging." Though appellate counsel has characterized the notebook as appellant's "private diary" (Appellant's Reply Brief at 22), the "diary" consisted of just one page, the first page, in fact, of the notebook. *United States v. Gargotto*, No. 74-1041 (6th Cir., filed Nov. 19, 1974), sustained the reasonableness of a search involving much greater "rummaging." Cf. *Philpott, supra* (more than thirty cartons of records seized); *United States v. Zive*, 299 F.Supp. 1273 (S.D.N.Y. 1973) (at least seven desk or file drawers).

THE INSTRUCTIONS TO THE JURY

Third, appellant claims that the district judge erred in charging the jury that it could convict appellant if the bank's money was "taken *or* carried away." Assuming that the instruction were error and even "plain error," Fed. R. Crim. P. 52(b), in light of appellant's failure to object to it,[8] it certainly was harmless. Neither appellant nor the evidence suggests the possibility that money was taken, but not carried away, or carried away, but not taken. *Marx, supra*, at 1185; *McDonnell v. United States*, 472 F.

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[8] Though defense counsel objected to two other aspects of the jury instructions, he failed to object to the "take *or* carry away" aspect. Objections to the Charge 3-5.

2d 1153, 1156-57 (8th Cir.), *cert. denied*, 412 U.S. 942 (1973); *United States v. Jacquillon*, 469 F.2d 380, 386 (5th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973).

THE SUFFICIENCY OF THE EVIDENCE

Fourth, appellant claims insufficient evidence was received to establish that the money was actually placed in the bag, that even if money were so placed that it was the bank's money, and that he was involved in the taking of the money. However, as hereinabove stated, branch manager Sledge testified that he "went to [his] head teller, Mrs. McMillan, and told her to fix me up fifty thousand dollars in a cloth bag," and that she "immediately, on my instructions, went to the vault and fixed up the money." Trial Transcript 82. Moreover, his secretary testified that "we" went to the vault "to get the money." Trial Transcript at 20-21. Although Mrs. McMillan never testified,[9] viewing the evidence and reasonable inferences therefrom in the light most favorable to the government, *United States v. Hearn*, 496 F.2d 236, 237 (6th Cir.), *cert. denied*, 95 S.Ct. 622 (1974), we find sufficient evidence that money belonging to the bank was placed in the bag. We consider the evidence that appellant was involved in obtaining the money to be overwhelming.

The conviction of violating the bank theft statute is affirmed; the conviction of violating the Hobbs Act is vacated.

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[9] On oral argument in this court, government counsel explained that, although Mrs. McMillan had been scheduled to testify, she was never called because it was "thought unnecessary." The trial transcript reflects the government's aim at facilitating the advance of the trial.

> "[THE COURT: Y]ou made an eariler estimate of seventy witnesses.
>
> "[THE PROSECUTOR]: I have been paring on it, if the Court please, and have pared it down as best I can to approximately forty-five at this time." Trial Transcript at 67.

BLEED THROUGH

APPENDIX B

No. 74-1704

United States Court of Appeals
For the Sixth Circuit

United States of America
Plaintiff-Appellee

v.

Richard Beck
Defendant-Appellant

ORDER

(Filed May 13, 1975)

Before: Celebrezze, Peck and McCree, Circuit Judges.

Petitioner-appellant's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit,

It Is Ordered that the petition be, and it hereby is denied.

Entered by Order of the Court

JOHN P. HELMAN
Clerk